

Notes on Article 10

10.01 Article 10 contains provisions on obligations concerning technological measures.

10.02 According to paragraph (1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices or the offer or performance or services having the same effect. A condition for proscription is that the person performing the act knows or has reasonable grounds to know that the device or service will be used for or in the course of the unauthorized exercise of any of the rights provided for under the proposed Treaty. This knowledge requirement therefore focuses on the purpose for which the device or service will be used. The expression "knowing or having reasonable grounds to know" has the same meaning as the expression "knowingly or with reasonable grounds to know" in the provisions on enforcement in the TRIPS Agreement.

10.03 Paragraph (2) includes a provision on remedies against the unlawful acts referred to in paragraph (1). The reason for a special provision on remedies is the fact that the provisions on enforcement in the TRIPS Agreement, which are applicable according to Article 14 of the proposed Treaty, only concern "any act of infringement of intellectual property rights covered by this Agreement". The obligations established in the proposed Article 10 are more akin to public law obligations directed at Contracting Parties than to provisions granting "intellectual property rights".

10.04 Contracting Parties are free to choose appropriate remedies according to their own legal traditions. The main requirement is that the remedies provided are effective and thus constitute a deterrent and a sufficient sanction against the prohibited acts.

10.05 Contracting Parties may design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject matter that is in the public domain. Having regard to differences in legal traditions, Contracting Parties may, in their national legislation, also define the coverage and extent of the liability for violation of the prohibition enacted according to paragraph (1).

10.06 Paragraph (3) contains the definition of a "protection-defeating device". It describes the characteristics of devices falling within the scope of the obligations under paragraph (1). To achieve the necessary coverage, the phrase "primary purpose or primary effect of which is to circumvent..." has been used rather than "specifically designed or adapted to circumvent...".

10.07 A proposal on this issue was made for the May 1996 session of the Committees of Experts by the United States of America (document BCP/CE/VII/2-INR/CE/VI/2). The ongoing international discussion has led to a number of modifications and these are incorporated in Article 10.

[End of Notes on Article 10]

Article 10

Obligations concerning Technological Measures

(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

(3) As used in this Article, "protection-defeating device" means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

[End of Article 10]

Notes on Article 11

11.01 According to Article 11, the introduction of the new form of protection provided for in the proposed Treaty adheres to a principle that is familiar from the field of copyright.

11.02 In paragraph (1), the right is introduced in such a way that all existing databases become protected from the moment of the entry into force of the proposed Treaty for each Contracting Party. The normal term of protection under Article 6 applies. A database that met the requirements of Article 1(1) before the entry into force of the proposed Treaty for a given Contracting Party, but within the term prescribed in Article 6, will be protected for the remainder of the Article 6 term. A database that met the requirements of Article 1(1) a longer time ago than the term prescribed in Article 6 will remain unprotected.

11.03 Paragraph (2) makes clear that the protection accorded by the proposed Treaty shall not be retroactive and shall not disrupt existing agreements. The protection is without prejudice to any acts performed, agreements concluded or rights acquired before the entry into force of the proposed Treaty for each Contracting Party.

11.04 Paragraph (3) allows transitional arrangements for a limited period of time. The purpose of these provisions is to protect investments made in the making copies by persons who in good faith engaged in the exploitation of databases in a situation where no protection existed. The provision makes it possible for Contracting Parties to provide for conditions under which copies made before the entry into force of the Treaty may continue to be distributed to the public after the entry into force of the Treaty. The time limit for such provisions is two years. Transitional arrangements only concern distribution of copies and do not extend to the reproduction of new copies by extraction, or to utilization of the database by making it available to the public by transmission.

[End of Notes on Article 11]

Article 11

Application in Time

(1) Contracting Parties shall also grant protection pursuant to this Treaty in respect of databases that met the requirements of Article 1(1) at the date of the entry into force of this Treaty for each Contracting Party. The duration of such protection shall be determined by the provisions of Article 8.

(2) The protection provided for in paragraph (1) shall be without prejudice to any acts concluded or rights acquired before the entry into force of this Treaty in each Contracting Party.

(3) A Contracting Party may provide for conditions under which copies of databases which were lawfully made before the date of the entry into force of this Treaty for that Contracting Party may be distributed to the public, provided that such provisions do not allow distribution for a period longer than two years from that date.

[End of Article 11]

Notes on Article 12

12.01 Article 12 deals with the relationship between the protection accorded under the proposed Treaty and existing or future rights and obligations. The protection granted under the proposed Treaty shall leave intact and shall in no way affect any "conventional" rights in the database or its contents. This principle is extended as well to any obligations that might exist with respect to the database or its contents. The Article contains a non-exhaustive list of rights and obligations.

[End of Notes on Article 12]

Article 12

Relation to Other Legal Provisions

The protection accorded under this Treaty shall be without prejudice to any other rights in, or obligations with respect to, a database or its contents, including laws in respect of copyright, rights related to copyright, patent, trademark, design rights, antitrust or competition, trade secrets, data protection and privacy, access to public documents and the law of contract.

[End of Article 12]

Notes on Article 13

13.01 Two alternatives on enforcement are presented in Article 13. The choice between them has been left to the Diplomatic Conference. This is because the issue of enforcement is a horizontal one that must be considered in connection with the two other proposed Treaties published simultaneously with the present proposed Treaty. Each of the two alternatives is based on the enforcement provisions of Part III, Articles 41 to 61, of the TRIPS Agreement.

13.02 Alternative A consists of the text of Article 13 and an Annex Paragraph (1) introduces the Annex which contains the substantive provisions on enforcement Paragraph (2) states that the Annex forms an integral part of the proposed Treaty. The provisions of the Annex have the same status as the provisions of the proposed Treaty.

13.03 Alternative B incorporates the enforcement provisions in the TRIPS Agreement by reference. The provisions of Alternative B obligate Contracting Parties to ensure that proper enforcement procedures, as specified in Part III, are available. To this end, Contracting Parties shall apply the relevant provisions of the TRIPS Agreement *mutatis mutandis*.

[End of Notes on Article 13]

Article 13

Special Provisions on Enforcement of Rights

Alternative A (continues on page 43)

(1) Special provisions regarding the enforcement of rights are included in the Annex to the Treaty.

(2) The Annex forms an integral part of this Treaty.

Alternative B

Contracting Parties shall ensure that the enforcement procedures specified in Part III, Articles 41 to 61, of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C, of the Marrakesh Agreement Establishing the World Trade Organization, concluded on April 15, 1994 (the "TRIPS Agreement"), are available under their national laws so as to permit effective action against any act of infringement of the rights provided under this Treaty, including expeditious remedies to prevent infringements, and remedies that constitute a deterrent to further infringements. To this end, Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 41 to 61 of the TRIPS Agreement.

[End of Article 13]

Notes on the Annex

14.01 The Annex forms the second part of Alternative A of Article 13. The Annex reproduces in its Articles 1 to 21, Part III, Articles 41 to 61, of the TRIPS Agreement. Certain necessary technical adaptations have been made, corresponding to the joint proposal made by the European Community and its Member States and Australia concerning the enforcement of rights which was submitted for the September 1995 sessions of the Committees of Experts (document BCP/CE/V/8). Certain other modifications have been made concerning clauses that are not relevant with regard to the proposed Treaty.

14.02 No detailed Notes are offered on the specific provisions of the Annex.

[End of Notes on the Annex]

Alternative A (continued from page 41)

ANNEX

Enforcement of Rights

SECTION 1

GENERAL OBLIGATIONS

Article 1

1. Contracting Parties shall ensure that enforcement procedures as specified in this Annex are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of rights covered by this Treaty shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Contracting Party's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Annex does not create any obligation to put in place a judicial system for the enforcement of rights covered by this Treaty distinct from that for the enforcement of law in general, nor does it affect the capacity of Contracting Parties to enforce their law in general. Nothing in this Annex creates any obligation with respect to the distribution of resources as between enforcement of rights covered by this Treaty and the enforcement of law in general.

SECTION 2

CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES

Article 2

Fair and Equitable Procedures

Contracting Parties shall make available to the right holders¹ civil judicial procedures concerning the enforcement of any right covered by this Treaty. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

Article 3

Evidence

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.
2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Contracting Party may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

¹ For the purpose of this Annex, the term "right holder" includes federations and associations having legal standing to assert such rights.

Article 4

Injunctions

1. The judicial authorities shall have the authority to order a party to desist from an infringement, inter alia to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of a right covered by this Treaty, immediately after customs clearance of such goods. Contracting Parties are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of a right covered by this Treaty.

[Paragraph 2 of Article 44 of the TRIPS Agreement is not reproduced here.]

Article 5

Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's right covered by this Treaty by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Contracting Parties may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Article 6

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. [A clause not reproduced here.]

Article 7

Right of Information

Contracting Parties may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

Article 8

Indemnification of the Defendant

1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.

2. In respect of the administration of any law pertaining to the protection or enforcement of rights covered by this Treaty, Contracting Parties shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

Article 9

Administrative Procedures

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 3

PROVISIONAL MEASURES

Article 10

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

- (a) to prevent an infringement of any right covered by this Treaty from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;
- (b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures exaudita altera parte where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted exaudita altera parte, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Contracting Party's law so permit or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of a right covered by this Treaty, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 4

SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES

Article 11

Suspension of Release by Customs Authorities

Contracting Parties shall, in conformity with the provisions set out below, adopt procedures² to enable a right holder, who has valid grounds for suspecting that the importation of [words omitted] pirated goods⁴ may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. [A clause omitted]. Contracting Parties may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

Article 12

Application

Any right holder initiating the procedures under Article 11 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is prima facie an infringement of the right holder's right covered by this

² Where a Contracting Party has dismantled substantially all controls over movement of goods across its border with another Contracting Party with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

³ It is understood that there shall be no obligation to apply such procedures to imports of goods put on the Market in another country by or with the consent of the right holder, or to goods in transit.

⁴ For the purposes of this Annex:

"pirated goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a right covered by this Treaty under the law of the country of importation.

Treaty and to supply a sufficiently detailed description of the goods to make them readily recognisable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

Article 13

Security or Equivalent Assurance

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

[Paragraph 2 of Article 53 of the TRIPS Agreement is not reproduced here.]

Article 14

Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 11.

Article 15

Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 10 shall apply.

Article 16

Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 15.

Article 17

Right of Inspection and Information

Without prejudice to the protection of confidential information, Contracting Parties shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Contracting Parties may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of goods in question.

Article 18

Ex Officio Action

Where Contracting Parties require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired prima facie evidence that a right covered by this Treaty is being infringed:

- (a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;
- (b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions mutatis mutandis set out at Article 15;
- (c) Contracting Parties shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

Article 19

Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 6. [A clause not reproduced here.]

Article 20

De Minimis Imports

Contracting Parties may exclude from the application of above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

SECTION 5

CRIMINAL PROCEDURES

Article 21

Contracting Parties shall provide for criminal procedures and penalties to be applied at least in cases of wilful [words omitted] piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. [A clause not reproduced here.]

[End of document]

APPENDIX D

104TH CONGRESS
2D SESSION

H. R. 3531

To amend title 15, United States Code, to promote investment and prevent intellectual property piracy with respect to databases.

IN THE HOUSE OF REPRESENTATIVES

MAY 23, 1996

Mr. MOORHEAD introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 15, United States Code, to promote investment and prevent intellectual property piracy with respect to databases.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Database Investment
5 and Intellectual Property Antipiracy Act of 1996".

6 **SEC. 2. DEFINITIONS.**

7 "Change of commercial significance" means a change
8 that a reasonable user of a database would regard as af-
9 fecting the quality, quantity or value of contents of that
10 database as a whole.

1 “Commerce” means all commerce that may lawfully
2 be regulated by Congress.

3 “Database” means a collection, assembly or compila-
4 tion, in any form or medium now or later known or devel-
5 oped, of works, data or other materials, arranged in a sys-
6 tematic or methodical way.

7 “Database maker” means the natural or juristic per-
8 son making a substantial investment, qualitatively or
9 quantitatively, in the collection, assembly, verification, or-
10 ganization and/or presentation of the contents of the
11 database. Unless provided otherwise by contract—

12 (1) where two or more persons qualify as the
13 makers of a database, they are jointly the database
14 maker;

15 (2) where a database is made by employees
16 within the scope of their employment, the employer
17 is the database maker; and

18 (3) where a database is made pursuant to spe-
19 cial order or commission, the person who ordered or
20 commissioned the database is the database maker.

21 “Database management information” means the
22 name and other identifying information of the database
23 maker, the name and other identifying information of the
24 database owner, and terms and conditions for extraction
25 and use or reuse of the contents of the database.

1 “Database owner” means the database maker or the
2 natural or juristic person who is the database maker’s suc-
3 cessor in interest.

4 “Extraction” means the permanent or temporary
5 transfer of all or a substantial part of the contents of a
6 database or of a copy or copies thereof. Such transfer may
7 be to an identical or different medium, and by any means
8 or in any form, now or later known or developed.

9 “Governmental entity” means the United States Gov-
10 ernment, any State, any agency or instrumentality of ei-
11 ther, and any officer or employee of any of the foregoing
12 acting in his or her official capacity.

13 “Insubstantial part” of a database means any portion
14 of the contents of a database whose extraction, use or
15 reuse does not diminish the value of the database, conflict
16 with a normal exploitation of the database or adversely
17 affect the actual or potential market for the database.

18 “Juristic person” means any firm, corporation,
19 union, association, non-profit institution, or other organi-
20 zation capable of suing and being sued in a court of law,
21 but does not include a governmental entity.

22 “Place in commercial use” means to use or reuse, or
23 to authorize use or reuse, for direct or indirect commercial
24 advantage or for financial gain.

1 “Person” means any natural person, any juristic per-
2 son, and any governmental entity.

3 “Use” and “reuse” means making available all or a
4 substantial part, qualitatively or quantitatively, of the con-
5 tents of a database, or access to all or such substantial
6 part, whether or not for direct or indirect commercial ad-
7 vantage or financial gain, by any means now known or
8 later developed, including any of the following: (i) market-
9 ing, selling, or renting; (ii) in the form of permanent or
10 temporary copies; or (iii) by distribution, any online or
11 other form of transmission.

12 **SEC. 3. DATABASES SUBJECT TO THE ACT.**

13 (a) A database is subject to the Act if it is the result
14 of a qualitatively or quantitatively substantial investment
15 of human, technical, financial or other resources in the
16 collection, assembly, verification, organization or presen-
17 tation of the database contents, and (i) the database is
18 used or reused in commerce; or (ii) the database owner
19 intends to use or reuse the database in commerce.

20 (b) A database otherwise subject to this Act shall re-
21 main subject, regardless of whether it is made available
22 to the public or in commercial use; the form or medium
23 in which it is embodied; or whether the database or any
24 contents of the database are intellectual creations.

1 (c) Except for a database made by a governmental
2 entity, any database otherwise subject to this Act, is not
3 excluded herefrom because its contents have been obtained
4 from a governmental entity.

5 (d) Computer programs are not subject to this Act,
6 including without limitation any computer programs used
7 in the manufacture, production, operation or maintenance
8 of a database. However, the contents of a database other-
9 wise subject to this Act remain subject, notwithstanding
10 their direct or indirect incorporation in a computer pro-
11 gram or other work.

12 **SEC. 4. PROHIBITED ACTS.**

13 (a) No person shall, without the authorization of the
14 database owner—

15 (1) extract, use or reuse all or a substantial
16 part, qualitatively or quantitatively, of the contents
17 of a database subject to this Act in a manner that
18 conflicts with the database owner's normal exploi-
19 tation of the database or adversely affects the actual
20 or potential market for the database;

21 (2) engage, notwithstanding section 5(a), in the
22 repeated or systematic extraction, use or reuse of in-
23 substantial parts, qualitatively or quantitatively, of
24 the contents of a database subject to this Act in a
25 manner that cumulatively conflicts with the database

1 owner's normal exploitation of the database or ad-
2 versely affects the actual or potential market for the
3 database; or

4 (3) procure, direct or commission any act pro-
5 hibited by subsections (i) or (ii).

6 (b) Acts that conflict with a normal exploitation of
7 the database or adversely affect the actual or potential
8 market for the database include but are not limited to the
9 extraction, use or reuse of all or a substantial part of the
10 contents of a database—

11 (1) in a product or service that directly or indi-
12 rectly competes in any market with the database
13 from which it was extracted; or

14 (2) in a product or service that directly or indi-
15 rectly competes in any market in which the database
16 owner has a demonstrable interest or expectation in
17 licensing or otherwise using or reusing the database;
18 or

19 (3) in a product or service for customers who
20 might otherwise reasonably be expected to be cus-
21 tomers for the database; or

22 (4) by or for multiple persons within an organi-
23 zation or entity in lieu of the authorized additional
24 use or reuse (by license, purchase or otherwise) of
25 copies of the database by or for such persons.